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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-375

GENEVIEVE M. HADDAD
Petitioner,
vs.
THE CROSBY CORPORATION, ET AL.,
Respondents.

REPLY BRIEF FOR PETITIONER PURSUANT TO SUPREME COURT RULE 24(4)

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Genevieve M. Haddad hereby respectfully submits her reply brief pursuant to Supreme Court Rule 24(4) as follows:

The respondents assert that: "This Case Does Not Present a Question Suitable for the Granting of a Writ of

Certiorari." We demur, most emphatically. With the line of cases of which *United States* v. *National Association of Securities Dealers*, 422 U.S. 694 (1975) and *Continential T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977) are characteristic, this Court has begun a careful, case-by-case re-examination of the applicability of the *per se* doctrine to vertical inter-relationships and, more fundamentally, the competitive impact of various vertical arrangements theretofore wholly, and uncritically, beyond the pale.

Here, the lower courts have taken some Delphic references to horizontal conduct in this Court's *N.A.S.D.* opinion and escalated them to carte[l] blanche for industry horizontal anti-competitive conduct (*per se* or no)[1] despite a clear Congressional mandate to the contrary,[2] when there is arguable regulatory agency jurisdiction.

Petitioner notes with some surprise respondents' apparent reversal in contention; now that the horizontal restraints of the secondary markets, alleged in Count I of

[1] As this Court has noted in prior opinions, where courts of appeal have misapplied, misconstrued or misconcieved a prior Supreme Court opinion, it is appropriate to grant the petition for writ of certiorari. *See Schlude* v. *Commissioner*, 372 U.S. 128 (1963); *Wilkinson* v. *United States*, 365 U.S. 399 (1961). Furthermore, where, as here, the decision of the court of appeals is based upon a point expressly reserved in a prior Supreme Court opinion or upon a point in need of clarification, it is equally appropriate to grant the petition. *See, e.g., United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976); *S.E.C.*, v. *United Benefit Life Ins. Co.*, 387 U.S. 202 (1967); *Federal Trade Commission* v. *Travelers Health Association*, 362 U.S. 293 (1960); *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U.S. 639 (1935).

[2] *See* 15 U.S.C. §78o-3(b)(8).

the Government Complaint in *N.A.S.D.*, were not effectively withdrawn[3] by the government. At the oral argument before this Court in *N.A.S.D.*, respondents' liaison counsel argued forcefully that the Government's Count I claim was nothing more than a non-case.[4]

The distinction this Court has attempted to make between permissible intra-product conduct which might have a net pro-competitive impact and traditional combinations, contracts, and conspiracies between competitors has plainly not been observed. This case is a suitable vehicle to that useful end.

WHEREFORE, for the foregoing reasons, as well as those already presented in our Petition for Writ of Certiorari, Haddad respectfully requests this Court to grant her petition for a writ of certiorari.

Respectfully submitted,

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[3] *See* Record at 50, *United States* v. *National Association of Securities Dealers*, 422 U.S. 694 (1975) [hereinafter "Record"] where respondents' liaison counsel, Mr. Loevinger, stated that:

> they [the Government] have now retreated from that allegation [horizontal restraints by the brokers] and thereby substantially withdrawn their count one charges.

He noted further that:

> [t]here is a formal allegation to this effect [suppression of a secondary market through brokers], but in fact it has been largely abandoned.

Record at 49-50

[4] Record at 50.